and Naturalization Service, were on the brief, for appellees.

Before EDGERTON, WILBUR K. MILLER, and FAHY, Circuit Judges.

EDGERTON, *Circuit Judge:* These are exclusion cases that have been consolidated. The plaintiffs arrived in the United States in August or October, 1952. They claimed and were denied admission as citizens of the United States. Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. (1946 ed.) § 903, provides that "if any person who claims a right or privilege as a national of the United States is denied such right or privilege * * * such person, regardless of whether he is within the United States or abroad, may institute an action * * * for a judgment declaring him to be a national of the United States * * *."

In 1954 the plaintiffs filed separate complaints for judgments declaring them to be citizens of the United States, and asked that the defendants be restrained from interfering with their rights as citizens. In each case the District Court denied a preliminary injunction on the ground that it was "without jurisdiction to hear plaintiff's complaint for declaratory judgment". These appeals followed.

In December, 1952, the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. § 1101 *et seq.*, had become effective. Section 403 (a) (42), 66 Stat. 280, repeals the Nationality Act of 1940. Section 360 (a) of the Act of 1952 provides in effect that if any person "who is within the United States" claims a right as a national of the United States, and the right is denied upon

the ground that he is not a national, he may institute an action for a declaratory judgment, "except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding." 66 Stat. 273, 8 U. S. C. § 1503 (a).

The question is whether the 1952 Act deprived the plaintiffs of their right under the 1940 Act to have the issue of their citizenship, which had arisen in exclusion proceedings, decided in actions for declaratory judgments. We think not.

The question turns upon the savings clause of the 1952 Act. That clause, § 405 (a), provides that "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect * * * any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *" 66 Stat. 280, 8 U. S. C., p. 734.

The general language in this savings clause is broad enough to cover the plaintiffs' rights, under the 1940 Act, to sue for declaratory judgments. It may be said that the only "rights" directly referred to in the savings clause are rights "in process of acquisition". But we think this phrase

was intended to have a broadening rather than a narrowing effect. Congress can hardly have intended to preserve *only* rights "in process of acquisition" and cut off rights fully acquired. Moreover, the savings clause is to be liberally interpreted. "The whole development of this general savings clause * * * manifests a well-established congressional policy not to strip aliens of advantages gained under prior laws. The consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress." *United States* v. *Menasche,* 348 U. S. 528, 535.

The general language in this savings clause operates "unless otherwise specifically provided" in the Act. This exception does not cover this case. Nowhere in the 1952 Act is it "specifically provided" that if the issue of citizenship has arisen in an exclusion proceeding, a right already accrued under the 1940 Act, to have the issue decided in an action for a declaratory judgment, shall be cut off.

Considered by itself, and apart from the fact that the savings clause is to be liberally interpreted, the reference in § 360 (a) of the Act to exclusion proceedings under "this or any other act" might perhaps seem to bring the case within the words "otherwise specifically provided". But specificity is a matter of degree. What may be relatively specific in one context may not be so in another. At several points in the 1952 Act, exceptions to the general principle of the savings clause are so specifically expressed as to make § 360 (a)

seem, by comparison, to fall far short of "specifically" providing an exception. For example, § 241 (d), 66 Stat. 208, 8 U. S. C. § 1251 (d), enacts that "the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated [as deportable] in subsection (a), notwithstanding * * * that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act." Section 360 (a), on the other hand, merely refers in general terms to an exclusion proceeding under "this or any other Act" and does *not* add: "notwithstanding that the exclusion proceeding occurred prior to the enactment of this Act." Section 313 (a), 66 Stat. 240, 8 U. S. C. § 1242 (a), enacts that "Nothwithstanding the provisions of section 405 (b) [a savings clause regarding petitions for naturalization] no person shall hereafter be naturalized as a citizen of the United States—(1) who advocates or teaches * * * opposition to all organized governments * * *"; and § 318, 66 Stat. 244, 8 U. S. C. § 1429, provides that "Notwithstanding the provisions of section 405 (b) * * * no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest * * *." Section 360 (a), on the other hand, does *not* enact that no action for a declaratory judgment may be instituted "notwithstanding the provisions of § 405 (a) * * *." Section 360 (a) does not mention § 405 (a).

We take § 360 (a) to mean that no right to have the issue of citizenship determined in a suit for a declaratory judgment shall arise in the fu-

ture, if the issue of citizenship arose in connection with exclusion proceedings. In view of the savings clause, we do not take § 360 (a) to mean that an existing right to sue for a declaratory judgment shall be cut off.

Our view of the case makes it unnecessary to decide whether the plaintiffs are "within the United States" in the sense of which § 360 (a) uses that term. Unless they are, the section does not apply to them at all. Even if they are, it does not bar their present suits.

We think the District Court erred in holding that it lacked jurisdiction.

Reversed.

In the United States Court of Appeals for the District of Columbia Circuit

October Term, 1955

No. 12092

WONG KAY SUEY, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLEES

No. 12093

WONG POO SING, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLEES

No. 12094

EMILY WONG, APPELLANT

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before EDGERTON, WILBUR K. MILLER and FAHY, Circuit Judges.

JUDGMENT

These appeals came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the orders of the said District Court appealed from in these cases be, and the same are hereby, reversed, and that these cases be, and they are hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Dated: October 13, 1955.

Per Circuit Judge EDGERTON.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 619

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, *Petitioner*

v.

WONG KAY SUEY, WONG POO SING, and EMILY WONG

Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1955

No. 619

Herbert Brownell, Jr., Attorney General of the United States, *Petitioner*

v.

Wong Kay Suey, Wong Poo Sing, and Emily Wong

Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The *unanimous* opinion of the Court of Appeals reversing the judgment of the District Court is reported at 227 F. 2d 41. The District Court made findings of fact and conclusions of law which appear in the record (R. 15-19).[1]

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1955 and appears at pp. 25-26 of the Appendix to Petitioner's petition herein. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

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[1] There is a consolidated record for all three cases.

QUESTION PRESENTED

Whether a person who asserted a claim to American citizenship which was denied and who then began to exhaust his administrative remedies while the Nationality Act of 1940 was still in effect, could sue for a declaratory judgment under section 503 of the 1940 Act after the final administrative denial of his asserted rights to citizenship, when such final administrative decision was not rendered until after the effective date of the Immigation & Nationality Act of 1952, by virtue of the savings clause under section 405 (a) of the 1952 Act?

STATUTES INVOLVED

Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U.S.C. (1946 ed.) 903, provided:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is in the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. • • •

Section 360 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 273, 8 U.S.C. 1503, provides:

> If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States,

except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the District Court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts.

Section 405 (a) of the Immigration and Nationality Act of 1952, 66 Stat. at 280, 8 U.S.C. 1101, note, provides:

Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enact-

ment of this Act, shall be regarded as a proceeding within the meaning of this subsection.

STATEMENT

Respondents claim American citizenship by derivation of the American citizenship of their fathers. They arrived in the United States in August and October of 1952, and the Immigration and Naturalization Service denied them admission on December 2 and 3, 1952. They then immediately proceeded to exhaust their administrative remedies (R. 7-11). Since December 1952, the respondents have been at liberty under bond and still are in the United States in the same status.

Following the exhaustion of the administrative rights and remedies available to respondents they instituted suits for a declaratory judgment under Section 503 of the Nationality Act of 1940. After the complaints were filed the respondents received orders to report for deportation. They then sought from the District Court preliminary injunctions restraining petitioner from deporting them. This was denied for lack of jurisdiction (R. 14-19).

In the instant case the Court of Appeals *unanimously* reversed the District Court, holding that a right existing on the effective date of the Immigration and Nationality Act of 1952 to sue for a declaratory judgment was not cut off by the 1952 Act by virtue of the savings clause in section 405 (a) of the 1952 Act.

The Court of Appeals flatly rejected the government contention, which had been followed by the District Court, that under 360 (a) of the 1952 Act no action for a declaratory judgment can be maintained after the effective date of the 1952 Act where the issue of citizenship arose in exclusion proceedings. The Court below interpreted section 360 (a) *prospectively* in the same manner that this Court had treated the whole 1952 Act a few months previously in *United States* v. *Menasche*, 348 U.S.

528, 75 S. Ct. 513. The following is what the Court below said:

> "We take section 360 (a) to mean that no right to have the issue of citizenship determined in a suit for a declaratory judgment *shall arise in the future*, if the issue of citizenship arose in exclusion proceedings. In view of the savings clause, we do not take section 360 (a) to mean that an existing right to sue for a declaratory judgment shall be cut off." 227 F. 2d 41, 43. (*emphasis added*)

REASONS FOR DENYING WRIT

I. The Decision Of The Court Below Follows The Principle Previously Laid Down By This Court In United States v. Menasche, supra:

The decision by the Court below is in complete accord with the principles and rules so clearly and exhaustively enunciated by this Court in the *Menasche* case, *supra*, and they both held that Congress intended the Immigration and Nationality Act of 1952 to apply *prospectively*. Further, both this Court in the Menasche, opinion, *supra*, and the Court below held that the savings clause in the 1952 Act was intended to be *liberally construed* so as to *preserve existing situations* and not take away or cut off rights acquired under prior law.

When this Court in *Menasche, supra*, referred to the "broad sweep of section 405 (a)" and indicated that it shall apply even to situations "unattended by any affirmative action" *unless* the 1952 Act "otherwise specifically provides" it gave obvious direction to the Court below in the instant case when it subsequently rendered its decision and immediately after quoting from *Menasche, supra*, said:

> "The general language in this savings clause operates 'unless otherwise specifically provided' in the Act. This exception does not cover this case. No-

> where in the 1952 Act is it 'specifically provided' that if the issue of citizenship has arisen in an exclusion proceeding, a right already accrued under the 1940 Act, to have the issue decided in an action for a declaratory judgment, shall be cut off." (227 F. 2d 41, 43)

In accord with the opinion of Mr. Justice Clark in *U. S.* v. *Menasche, supra,* and following the above quoted section of its own opinion the Court below proceeded to enumerate several situations, such as the deportation provisions of the Act,[2] where Congress with *specificity* said time and again "Notwithstanding the provisions of section 405 (a) or (b)" the new law shall apply. Since section 360 (a), 8 U.S.C.A. 1503,[3] did not specifically, in the aforesaid manner, refer to the savings clause in section 405 (a) the Court below was obviously correct in holding that the old law (1940 Act) applied to the instant case. To have held otherwise, would have attributed to Congress the adoption of a meaningless provision of law in the form of section 405 (a).

It should be noted that the decision below was rendered on October 13, 1955, and that it was decided *after* the *Menasche* decision which was handed down on April 4, 1955.[4]

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[2] See section 241(d), 8 USCA 1251(d).

[3] This is the section which the Solicitor General relies upon in asserting that the instant case comes without the savings clause.

[4] The case of *Nevarez* v. *Brownell,* 218 F. 2d 575, which the government erroneously contends is in conflict with the decision below, was decided *before* this Court rendered its decision in *Menasche, supra.* Respondents believe there is no conflict in principle, if there is a conflict at all, between the opinion below and the opinion of the Fifth Circuit Court of Appeals in *Nevarez, supra.* (see Point II of this Brief, *infra*) Further, it is submitted that the Fifth Circuit in *Nevarez, supra,* would undoubtedly have reached a different result had it had the benefit of the guidance laid down by this Court in *Menasche, supra.*

The decision below was not only consistent with its previous ruling in *Bertoldi* v. *McGrath,* 178 F. 2d 997, which was noted by Mr. Justice Clark of this Court in the *Menasche* opinion, *supra,* but it also quotes *only* from the *Menasche* opinion, *supra,* of this Court.

The instant case is even more persuasive than the *Menasche* case, *supra,* from the standpoint of a well established Congressional policy of saving and preserving rights acquired under prior laws rather than destroying them because *Menasche* was an alien seeking to be naturalized. Here we have three claimants to American citizenship. Therefore, since a liberal policy has been properly attributed to Congress by this Court regarding the preservation of rights of aliens under prior laws it certainly is fair to attribute an even greater attitude of leniency by Congress toward American citizens or those who claim it.

II. The opinion below is distinguishable from the opinion of the Fifth Circuit in Nevarez v. Brownell, supra:

The opinion of the Court of Appeals for the Fifth Circuit in *Nevarez* v. *Brownell, supra,* can be distinguished from the instant case on the facts, and by comparing the difference in the issues raised as well as the rationale of the two decisions.

In *Nevarez, supra,* the appellant was not seeking admission to the United States as a citizen like those involved in the instant case. *Nevarez* was resisting deportation on the ground that he was a citizen and had not previously expatriated himself. In addition, *Nevarez,* filed suit *before* the 1952 Act became effective, and then the action abated and was dismissed for his failure to comply with Rule 25(d) of the Federal Rules of Civil Procedure. No such situation occurred in the instant case.

Following a dismissal of the first suit *Nevarez,* started a second suit *after* the 1952 Act became effective and contended that it was a continuation of the first suit which had previously abated and that he, therefore, was entitled to proceed under the savings clause of the 1952 Act. No such situation occurred in the instant case as only one suit was filed, and the argument as to the savings clause in the *Nevarez* case obviously went only to the question as to whether it covered an action previously dismissed. This argument is and was quite different from the instant case where there was no question of abatement of a prior action and where the question was solely whether a right which accrued under the 1940 Act could be maintained after the effective date of the 1952 Act under the language of the savings clause in the 1952 Act.

The Court below in the instant case stated as follows:

> "The question turns upon the savings clause of the 1952 Act." 227 F. 2d 41, 42.

The court below also pointed out that:

> "The general language of this savings clause operates 'unless otherwise specifically provided' in the act." 227 F. 2d 41, 43.

Further, the court below noted that the reference in section 360 of the 1952 Act to exclusion proceedings does not bring the case within the words "unless otherwise specifically provided" of the savings clause. The Court of Appeals for the Fifth Circuit in *Nevarez* cannot be said to disagree because it did not hold that the language contained in section 360 was one of the "exceptions" contemplated by Congress in enacting the savings clause. The Fifth Circuit merely held that section 360 prevented an action for a declaratory judgment under the facts present in that case.

Since the issue was different in *Nevarez* from that present in the instant case below, and since the *Nevarez*

case was decided on the basis of section 360 alone, it is submitted that there is no conflict in principle that is here involved. Actually, the only conflict is in the end result and this must be considered in the light of the different factual situation and issues present in the two cases.

III. The Legislative History of The 1952 Act And The Express Language of The Statute Do Not Support The Government Position:

The Government's petition for a writ of certiorari in this case refers to the legislative history of the 1952 Act and concludes that Congress was dissatisfied with the pattern under section 503 of the 1940 Act and therefore changed the procedure in the 1952 Act as reflected in section 360 of the new law. The inference seems to be that since the 1940 Act was repealed, and since the new Act did not continue former section 503 as it was before, that Congress did not intend the savings clause in the 1952 Act to apply to situations like the instant case. This suggests that Congress did not know what it was doing or know what it said in enacting the savings clause. The government certainly knows better. Moreover, no reference to the legislative history is necessary in this case because the language of the statute itself is clear.

The government also says in its petition at pages 9-10, 15-16, that Congress was concerned with the number of persons who gained entry into the United States under section 503 of the 1940 Act where no such right existed. If this abuse were as bad as the government implies, and if Congress really had intended to do what the government now says it meant to do, namely, cut off all rights to sue for a declaratory judgment under the 1940 Act where the issue arose in exclusion proceedings, then, they could have and would have done so expressly. Ob-

viously, Congress was not as concerned as the Solicitor General would have this Court believe because section 360 could have been specifically exempted from the operation of the savings clause in section 405 (a) just as was done in the deportation and other provisions of the Act. For example, see sections 513 (a), 8 U.S.C.A. 1424 (a); 315 (b), 8 U.S.C.A. 1426 (a); 318, 8 U.S.C.A. 1429. As hereinbefore indicated the Congress intended the 1952 Act to apply *prospectively. United States* v. *Menasche, supra.*

IV. The Instant Case Does Not Merit this Court's Attention Because It Has No Substantial Relation To The Present Administration Of Our Immigration Laws:

The importance of the instant case in terms of the administration of our immigration and nationality laws has been over-stated and grossly exaggerated. In fact, the State Department figures quoted at page 9 of petitioner's brief herein are misleading insofar as any applicability to the instant situation is concerned. For example, certificates of loss of nationality under the 1940 Act were issued for a variety of reasons such as expatriation. Thus, in the absence of a showing of duress, those people who had expatriated themselves would not be able to succeed under the doctrine eunciated by the Court below because expatriation is an affirmative defense to an action for a declaration of citizenship.

Also, four years have passed since 1952 and the alleged 37,518 people referred to on page 9 of petitioner's brief have not flooded our courts yet. Had they been desirous of doing so they certainly would have tried before now. Even if they did it is not for the Solicitor General to say or imply that judicial review in our courts is a practice to be frowned upon or guarded against. At any rate is certainly does not appear from the record of cases similar to the instant one or from the cases similar

to those referred to herein by the government that the problem is presently of great importance to our administrators or the courts in terms of the number of possible litigants.

Aside from the fact that four years have passed since 1952 it can be assumed that many, if not the majority of the 37,518 persons referred to by the government at page 9 of its petition herein were issued their certificates of loss of nationality long before the 1952 Act became effective. These, then, could have exhausted their administrative remedies and filed suit under the 1940 Act long before the 1952 Act came into being. Again, the fact that they did not do so shows that the great majority have long since abandoned the idea.

CONCLUSION

The writ should be denied because this Court in *United States* v. *Menasche, supra,* has already decided the applicable principle here involved. Moreover, the decision below, which came six (6) months *after Menasche,* supra, is clearly correct in its application of the principles and philosophy laid down by this Court in *Menasche, supra.* Furthermore, there is no real conflict between the opinion below and that of the Fifth Circuit in *Nevarez* v. *Brownell, supra,* which, in any event, was decided *prior* to this Court's decision in the *Menasche* case. Finally, the effect of the decision below upon the administration of our Immigration laws has been grossly exaggerated by the Government.

Respectfully submitted,

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